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# In the Supreme Court of the United States

OCTOBER TERM, 1958

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No. 438

HENRY L. HESS, JR., ADMINISTRATOR OF THE ESTATE OF  
GEORGE WILLIAM GRAHAM, DECEASED, PETITIONER

v.

UNITED STATES OF AMERICA

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED  
STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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BRIEF FOR THE UNITED STATES IN OPPOSITION

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## OPINIONS BELOW

The opinion of the United States District Court for the District of Oregon (R. 47-48) is reported at 1958 A. M. C. 660. The opinion of the United States Court of Appeals for the Ninth Circuit (Pet. 11-28) is not as yet reported.

## JURISDICTION

The judgment of the court of appeals was entered on August 20, 1958 (R. 257). The petition for writ of certiorari was filed on October 13, 1958. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

### QUESTIONS PRESENTED

1. Whether the Government's liability under the Federal Tort Claims Act for an injury on Oregon navigable waters allegedly caused by the operation of a Government dam is governed by the general maritime law, as would an action between private parties in an Oregon state court.

2. Whether the Oregon Employers' Liability Law is applicable to an action on a maritime tort.

3. Whether the district court correctly held that the Oregon Employers' Liability Law was by its terms inapplicable to the facts of this case.

### STATUTES INVOLVED

The relevant provisions of the Federal Tort Claims Act (28 U. S. C. 1346 (b) and 2674), the Oregon Employers' Liability Law (ORS 654.305-654.335), and the Oregon Wrongful Death Statute (ORS 30.020) are set forth in the Appendix, *infra*, pp. 14-18.

### STATEMENT

This action was instituted by petitioner against the United States, under the Federal Tort Claims Act, to recover damages for the death of petitioner's decedent, George William Graham, a carpenter foreman engaged in work connected with a contract between his employer and the United States.

1. *The undisputed facts.*<sup>1</sup>—On June 23, 1954, decedent's employer, Robert C. Larson, doing business as the Larson Construction Company, entered into a

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<sup>1</sup> Nearly all of the evidentiary facts were stipulated (R. 34-46).

contract with the Corps of Engineers of the United States Army for the repair of the Bonneville Dam, a Government-owned facility on the Columbia River (R. 49-51). This facility includes a powerhouse between the Oregon shore and Bradford Island, and a spillway dam between Bradford Island and the Washington shore. The dam contains eighteen bays, numbered from the fishway bay on the Washington shore (Bay 1) to the fishway bay of Bradford Island (Bay 18) (R. 50). Each bay has a movable gate which is opened and closed vertically (R. 50). On the downstream side of the dam is a concrete structure called a baffle deck. It is dotted with concrete blocks called baffles, which serve to dissipate the energy and velocity of the water discharged through the dam (R. 50-51).

The contract between Larson and the United States called for the restoration of these baffles, which had been eroded by water, and for the construction of a temporary cofferdam to permit the restoration work to be done (R. 149). Larson was required by the contract to furnish all necessary materials, labor, and equipment (R. 51). Construction of the cofferdam was to begin while water was being necessarily discharged through the spillway, until the flow of the river had receded to a point where the entire flow could be handled through the power station (R. 51). Larson was to inform the Government of all proposed action on his part which would have an effect upon the operation of the spillway dam (R. 51).

On August 13, 1954, Larson was notified that the level of the river was such that, under the contract, he

was to start work within ten days (R. 52). On the same day he conferred with Albert M. Capps, the superintendent in charge of the Bonneville Dam, about the closing of a number of the gates in order to facilitate the construction of the cofferdam. As a result, the gates in Bays 11-17 were immediately closed (R. 52). Between August 16 and August 20, 1954, the Government construction project engineer, Patrick S. Leonti, conferred with Larson (R. 53). Leonti informed Larson that requests to close additional gates should be directed to him and that he would then relay those requests to the appropriate operational personnel (R. 53).

According to the contract, a part of the cofferdam was to consist of a timber crib in Bay 9 resting on the top of the "ogee" curve—the upper line of the permanently submerged part of the dam (R. 50)—and running at right angles to the face of the dam (R. 53). The contract drawing reflected the cross-section of the ogee as originally constructed, but Larson believed it might subsequently have become eroded and decided to take soundings to establish its true cross-section. The contract did not require or refer to the taking of soundings (R. 53-54).

On August 18, 1954, Larson requested Leonti to have the gates in Bays 9 and 10 closed by 12:30 P. M. on August 20, in order to facilitate the taking of soundings (R. 54). Leonti forwarded the request to the operations division of the dam and it was fulfilled (R. 54). On the basis of a reconnaissance trip by his superintendent on August 19, and his own personal observations of the situation, Larson determined for

himself that the soundings could be safely accomplished according to the plan he had devised (R. 55). He did not seek the advice of the Government on the matter and at no time was there a request that any additional gates be closed (R. 54, 55).

On August 20, the tug MULEDUZER set out from the Bradford Island shore pushing a barge which was fastened to the tug by four steel lines (R. 55-56). Both the tug and the barge were owned by Larson (R. 55). Aboard them were the decedent and five other Larson employees, one of whom was in sole charge of the operation (R. 55). All of the personnel and equipment involved were selected by Larson himself (R. 55).

The tug and barge headed downstream for some distance and then proceeded upstream towards Bay 9 (R. 56). As the barge reached Bay 9 it veered in a northerly direction and its port bow struck a pier between Bays 8 and 9 (R. 56). The bow was stoved in, and, as water rushed in through the hole, the barge was driven in front of Bay 8 and the other open bays. The barge and tug were swamped and sunk. Five of the six men aboard, including the decedent, were drowned.

2. *Proceedings in the courts below.*—On April 18, 1955, this suit was brought under the Tort Claims Act (R. 3). On March 29, 1957, following a full trial, the district court rendered an opinion in which it concluded that the United States was not liable (R. 47-48). The court ruled that petitioner had not established that the Government was negligent "in any respect" and that, therefore, he was not entitled to



recovery under the Oregon Wrongful Death Statute (*infra*, p. 18). The court further held that the Oregon Employers' Liability Law (*infra*, pp. 14-18) was inapplicable because (1) the Government was not responsible for the work being performed by Larson and, therefore, by its terms the Law was inapplicable; and (2) the high standard of care imposed by the Law may not constitutionally be applied to actions involving torts consummated on navigable waters and governed by the maritime law.

On May 9, 1957, the court supplemented its opinion with findings of fact and conclusions of law (R. 48-62). In addition to the undisputed facts, the court found that (1) the immediate cause of the accident was the turbulent condition of the water in the spillway; (2) this condition was open, apparent, and obvious to Larson, the tugboat operator, and his other employees; (3) the difference in the elevation of the water in front of the open gates of the spillway dam and that in front of the closed gates was also visible and obvious; (4) Larson was an independent contractor and had not operated under the supervision, control, or direction of the United States; (5) the Government had no control over the details, manner, or method by which the work under the contract was to be accomplished but was interested only in insuring a general result in conformity with the contract and had retained a right to inspect the work during its progress to determine whether this result was being obtained; (6) Larson had determined for himself the method, manner, and means by which the sounding operation would be carried out and no employee of



the United States participated in the operation or gave Larson or any of his employees direction or orders with respect thereto; (7) no employee of the Government had been engaged in the sounding operation and there had been no intermingling of the employees of the United States with those of Larson in connection with the work being performed at the time of Graham's death; and (8) the Government was not in charge of, responsible for, or engaged in the work being performed by Larson which resulted in the accident (R. 56-59). In accordance with the court's findings and conclusions of law, judgment was entered for the United States (R. 62-63).

The court of appeals affirmed. It held that, since the accident occurred on navigable waters, the applicable law of Oregon—the place where the act or omission occurred—was the general maritime law. It further held that the Oregon Employers' Liability Law was inconsistent with the maritime law and thus would not be applied by the Oregon courts in the circumstances of the case. Finally, the court determined that the findings of the district court relating to the negligence of the Government were supported by the evidence and that, therefore, liability could not be imposed under the Oregon Wrongful Death Statute.

#### ARGUMENT

Petitioner does not challenge the findings below that the United States was not liable under the standards of the general maritime law as supplemented by the Oregon Wrongful Death Statute. His sole claim

here is that the cause of action was governed by the Oregon Employers' Liability Law, which provides in part (§ 654.305, *infra*, pp. 14-15):

Generally, all owners, contractors or subcontractors and other persons having charge of, or responsible for, any work involving a risk or danger to the employes or the public, shall use every device, care and precaution which it is practicable to use for the protection and safety of life and limb, limited only by the necessity for preserving the efficiency of the structure, machine or other apparatus or device, and without regard to the additional cost of suitable material or safety appliance and devices.

Petitioner contends that the Liability Law applies either (1) because the action is not governed by maritime law or (2) because the Liability Law is a permissible supplement to the maritime law even if the latter does govern. Neither contention is sound. In addition, the district court's finding that the United States was not "responsible" for the work would preclude recovery under the Liability Law even if it otherwise applied.

1. The only argument discussed by petitioner as a reason for granting the writ is his contention that the cause of action is not governed by maritime law. Petitioner does not dispute that, since the injury occurred on the navigable waters of the United States, an Oregon state court would of necessity apply the general maritime law to a similar action between private parties. See *The Plymouth*, 3 Wall. 20, 35-36; *The Lottawanna*, 21 Wall. 558, 575. Actions under

the Federal Tort Claims Act are, in turn, governed by "the law of the place where the act or omission occurred." 28 U. S. C. 1346 (b), *infra*, p. 14. The purpose was to make the United States liable to the same extent that a private person would be in like circumstances. 28 U. S. C. 2674, *infra*, p. 14; see *Indian Towing Co. v. United States*, 350 U. S. 61, 68. Since all of the acts or omissions alleged, as well as the injury, occurred in Oregon, it would seem to be beyond dispute that the action is to be governed by the law that would be applied by an Oregon court to these facts—*i. e.*, the general maritime law.<sup>2</sup>

Petitioner contends, however, that the "place" where the alleged omission occurred was on land (*i. e.*, the dam itself, which petitioner contends is an extension of "land") and hence that the proper reference under the Tort Claims Act is to the law governing torts occurring on land rather than torts occurring on navigable waters. Petitioner's premise is that the Tort Claims Act's reference to "the law of the place where the act or omission occurred" is a reference to a particular state substantive rule applicable to the specific locality or type of terrain on which the act occurred. The contention is insubstantial. Patently, the Act's choice-of-laws provision is no more than a typical conflicts rule specifying the

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<sup>2</sup> For Federal Tort Claims Act cases applying general maritime principles under this theory, see *Somerset Seafood Co. v. United States*, 193 F. 2d 631 (C. A. 4); *Russell, Poling & Co. v. United States*, 140 F. Supp. 890, 892 (S. D. N. Y.); *State Road Department v. United States*, 78 F. Supp. 278, 280 (N. D. Fla.); *Moran v. United States* 102 F. Supp. 275, 278-279 (D. Conn.).

*jurisdiction* (normally a state) whose laws shall govern the action. Since only political entities have laws (certainly dams do not), "the law of the place" can mean nothing else. And once the reference has been made to the appropriate state, the determination of the substantive rule applicable to the particular transaction is a question of state law, limited, as here, by the state's obligation to follow the maritime law.

*Eastern Air Lines v. Union Trust Co.*, 221 F. 2d 62 (C. A. D. C.), certiorari denied *sub nom. Union Trust Co. v. United States*, 350 U. S. 911, relied upon by petitioner, held only that the action was governed by the law of the place where the negligent acts occurred (Virginia) rather than that of the place of the injury (District of Columbia). That was a choice simply of the jurisdiction to whose laws reference should be made and in no way conflicts with the instant case, where all the relevant events occurred in Oregon and it is agreed by all that Oregon law is controlling.

2. Petitioner renews, but does not discuss, his alternative contention below that, even if the action is governed by the maritime law, the Oregon Employers' Liability Law may be applied as a supplement to that law. Since petitioner does not urge that question—turning as it does upon an appraisal of the inconsistencies between the maritime law and the particular state statute—as a reason for granting the writ, it need be only briefly considered.

It is now settled that the considerations in favor of a uniform national maritime law (see *The Lottawanna*, *supra*) prohibit resort to state statutes "which

work material prejudice to the characteristic features of the general maritime law." *Southern Pacific Co. v. Jensen*, 244 U. S. 205, 216.<sup>3</sup> The Oregon Employers' Liability Law has been held to, and manifestly does, fall in that category. *Sanderson v. Sause Bros. Ocean Towing Co.*, 114 F. Supp. 849 (D. Ore.). It requires an employer to use every practicable safety "device, care and precaution", regardless of cost or any test of reasonableness, and is thus a radical departure from the traditional standard of due care.<sup>4</sup> See, e. g., *Fromme v. Lang & Co.*, 131 Ore. 501, 504-505; *Hoffman v. Broadway Hazelwood*, 139 Ore. 519. That it is even more drastic in the scope of the persons made subject to that duty is shown by this very case: if the terms of the Liability Law would apply here, as petitioner claims, then it is clear that the Law has imposed upon property owners entirely new duties to the employees of an independent contractor.

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<sup>3</sup> See also, to the same effect: *Knickerbocker Ice Co. v. Stewart*, 253 U. S. 149; *Great Lakes Dredge & Dock Co. v. Kierejewski*, 261 U. S. 479; *Messel v. Foundation Co.*, 274 U. S. 427, 434; *Minnie v. Port Huron Terminal Co.*, 295 U. S. 647; *Pope & Talbot, Inc. v. Hawn*, 346 U. S. 406.

State wrongful death statutes which simply provide a remedy for a recognized common-law liability may, on the other hand, be applied in admiralty, since they work no prejudice to its characteristic features. *Western Fuel Co. v. Garcia*, 257 U. S. 233, 240. It has also been held that the maritime law is not controlling where the plaintiff's employment and activities at the time of injury have no direct relationship to navigation or commerce and are matters of merely local concern. *Grant Smith-Porter Co. v. Rohde*, 257 U. S. 469, 476.

<sup>4</sup> Liability for negligence under the maritime law is, of course, measured by the reasonable care standard. E. g., *Jacob v. New York City*, 315 U. S. 752; *The Joseph B. Thomas*, 86 Fed. 658 (C. A. 9); *Jeffries v. DeHart*, 102 Fed. 765 (C. A. 3).

In *Robbins Dry Dock Co. v. Dahl*, 266 U. S. 449, this Court held that the New York Labor Law, which similarly departs from the reasonable care standard, could not be applied in an action on a maritime tort. See also, to the same effect, *Schuede v. Zenith S. S. Co.*, 216 Fed. 566 (N. D. Ohio) (Ohio Employers' Liability Act); *Payne v. Jacksonville Forwarding Co.*, 290 Fed. 936, 938 (C. A. 5) (Florida Hazardous Employment Act); *Young v. Clyde S. S. Co.*, 294 Fed. 549, 550-551 (S. D. Fla.) (same); *Turner v. Wilson Line*, 142 F. Supp. 264 (D. Mass.) ("punitive" Massachusetts Death Statute). And in *Hawkins v. Anderson & Crowe, Inc.*, 84 Ore. 94, 101, the Oregon Supreme Court stated with reference to the Employers' Liability Law itself:

It may be that the rights of the parties are to be determined by the maritime law: *Schuede v. Zenith Steamship Co.* (D. C.), 216 Fed. 566. If so, the provisions of the Employers' Liability Law \* \* \* are certainly not applicable.

3. In all events, it is clear, as the district court held (R. 47),<sup>5</sup> that petitioner has not established a right to recover under the Employers' Liability Law even if that Law is applicable. The district court expressly found that the United States "was not in charge of, responsible for or engaged in the work being performed by the independent contractor which resulted in the fatal accident" (R. 59). That finding is fully supported by the evidence (see the Statement, *supra*, pp. 2-5) and the court's subsidiary findings (*c. g.*, R.

<sup>5</sup> The court of appeals found it unnecessary to reach this question.



57-59) and is a correct application of the Oregon law as interpreted by the Oregon Supreme Court. As that court observed in rejecting a similar claim under the Employers' Liability Act (*Wärner v. Synnes, et al.*, 114 Ore. 451, 458):

It is well settled in this jurisdiction that where the work is in charge of a contractor and the party with whom he contracts is concerned only in the general result of the work and has no control of the details and manner in which the work shall be accomplished the contractor alone is responsible to the person in his employ who is injured during the progress of the work.  
\* \* \* The reason \* \* \* is that the owner is not the person in charge of the work and so is not responsible for the injury complained of.

See also *Laurton v. Morgan, Fliedner & Boyce*, 66 Ore. 292; *Tamm v. Sauset*, 67 Ore. 292.

#### CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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NOVEMBER 1958.



## APPENDIX

1. The relevant provisions of the Federal Tort Claims Act are as follows:

28 U. S. C. 1346 (b).

Subject to the provisions of chapter 171 of this title, the district courts, together with the District Court for the Territory of Alaska, the United States District Court for the District of the Canal Zone and the District Court of the Virgin Islands, shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

\* \* \* \*

28 U. S. C. 2674.

The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances, but shall not be liable for interest prior to judgment or for punitive damages.

\* \* \* \*

2. The Oregon Employers' Liability Law provides as follows (Ore. Rev. Stat.):

654.305 *Protection and safety of persons in hazardous employment generally. Generally,*

all owners, contractors or subcontractors and other persons having charge of, or responsible for, any work involving a risk or danger to the employes or the public, shall use every device, care and precaution which it is practicable to use for the protection and safety of life and limb, limited only by the necessity for preserving the efficiency of the structure, machine or other apparatus or device, and without regard to the additional cost of suitable material or safety appliance and devices.

654.310 *Protective measures to be observed regarding certain machines, equipment and devices which are dangerous to employes.* All owners, contractors, subcontractors or persons whatsoever, engaged in the construction, repairing, alteration, removal or painting of any building, bridge, viaduct or other structure, or in the erection or operation of any machinery, or in the manufacture, transmission and use of electricity, or in the manufacture or use of any dangerous appliance or substance, shall see that:

(1) All metal, wood, rope, glass, rubber, gutta percha or other material whatever, is carefully selected and inspected and tested, so as to detect any defects.

(2) All scaffolding, staging, false work or other temporary structure is constructed to bear four times the maximum weight to be sustained by said structure, and such structure shall not at any time be overloaded or overcrowded.

(3) All scaffolding, staging or other structure more than 20 feet from the ground or floor is secured from swaying and provided with a strong and efficient safety rail or other contrivance, so as to prevent any person from falling therefrom.

(4) All dangerous machinery is securely covered and protected to the fullest extent that the proper operation of the machinery permits.

(5) All shafts, wells, floor openings and similar places of danger are inclosed.

(6). All machinery other than that operated by hand power, whenever necessary for the safety of persons employed in or about the same or for the safety of the general public, is provided with a system of communication by means of signals, so that at all times there may be prompt and efficient communication between the employes or other persons and the operator of the motive power.

(7). In the transmission and use of electricity of a dangerous voltage, full and complete insulation is provided at all points where the public or the employes of the owner, contractor or subcontractor transmitting or using the electricity are liable to come in contact with the wire, and dead wires are not mingled with live wires, nor strung upon the same support, and the arms or supports bearing live wires are especially designated by a color or other designation which is instantly apparent.

(8) Live electrical wires carrying a dangerous voltage are strung at such distance from the poles or supports as to permit repairmen to freely engage in their work without danger of shock.

654.315 *Persons in charge of work to see that ORS 654.305 to 654.335 is complied with.* The owners, contractors, subcontractors, foremen, architects or other persons having charge of the particular work, shall see that the requirements of ORS 654.305 to 654.335 are complied with.

654.320 *Who considered agent of owner.* The manager, superintendent, foreman or other person in charge or control of all or part of the construction, works or operation shall be held to be the agent of the employer in all suits for damages for death or injury suffered by an employe.

654.325 *Who may prosecute damage action for death; damages unlimited.* If there is any loss of life by reason of violations of ORS 654.305 to 654.335 by any owner, contractor or subcontractor or any person liable under ORS 654.305 to 654.335, the surviving spouse and children and adopted children of the person so killed and, if none, then his or her lineal heirs, and, if none, then the mother or father, as the case may be, shall have a right of action without any limit as to the amount of damages which may be awarded. If none of the persons entitled to maintain such action reside within the state, the executor or administrator of the deceased person may maintain such action for their respective benefits and in the order above named.

654.330 *Fellow servant's negligence as defense.* In all actions brought to recover from an employer for injuries suffered by an employe, the negligence of a fellow servant shall not be a defense where the injury was caused or contributed to by any of the following causes:

(1) Any defect in the structure, materials, works, plant or machinery of which the employer or his agent could have had knowledge by the exercise of ordinary care.

(2) The neglect of any person engaged as superintendent, manager, foreman or other person in charge or control of the works, plant, machinery or appliances.

(3) The incompetence or negligence of any person in charge of, or directing the particular work in which the employe was engaged at the time of the injury or death.

(4) The incompetence or negligence of any person to whose orders the employe was bound to conform and did conform and by reason of his having conformed thereto the injury or death resulted.

(5) The act of any fellow servant done in obedience to the rules, instructions or orders given by the employer or any other person who has authority to direct the doing of said act.

654.335 *Contributory negligence.* The contributory negligence of the person injured shall not be a defense, but may be taken into account by the jury in fixing the amount of the damage.

3. The Oregon Wrongful Death Statute provides as follows (Ore. Rev. Stat.):

30.020 *Action by personal representative for wrongful death.* When the death of a person is caused by the wrongful act or omission of another, the personal representatives of the decedent, for the benefit of the surviving spouse and dependents and in case there is no surviving spouse or dependents, then for the benefit of the estate of the decedent, may maintain an action against the wrongdoer, if the decedent might have maintained an action, had he lived, against the wrongdoer for an injury done by the same act or omission. Such action shall be commenced within two years after the death, and damages therein shall not exceed \$20,000, which may include a recovery for all reasonable expenses paid or incurred for funeral, burial, doctor, hospital or nursing services for the deceased.